

1 we've been discussing this morning, argument of counsel,  
2 does it truly reflect the attitude of the licensees?

3 MR. HONIG: Well, the licensee signed it, and it  
4 wasn't a difficult argument to understand.

5 MS. GREENE: Is there anything in the record that  
6 indicates that the -- apart from this argument arguably of  
7 counsel, that anything in the record indicates that the  
8 licensee's inadequate recruitment efforts were inadequate  
9 because they intended by that to restrict the access of  
10 minorities that were there, to preclude the hiring of  
11 minorities at the station?

12 MR. HONIG: First, you had the very unusual  
13 failure to include even an EEO notice of industry standard  
14 on job postings. You had the job application form,  
15 Lutherans preferred. You have all these very careful and  
16 detailed job descriptions. A sophisticated company has  
17 individual job description -- "Lutherans preferred" in  
18 various ways.

19 And then it's linked up with the argument which  
20 the Commission understood in the HDO that, well, there  
21 aren't that many minority Lutherans. There aren't that many  
22 minorities in our opinion that have classical music  
23 expertise.

24 It's linked together in such a way that it becomes  
25 evidence both of an intention not to comply with the

1 Affirmation Action rule, but it is also a piece of evidence  
2 that adds to the inference of discrimination.

3 If I could, I'd like to talk about this question  
4 of whether this is argument of counsel, apart from the fact  
5 that it was signed by Mr. Stortz.

6 Mr. Zauner has referred to the Florida NAACP case,  
7 and I'd like to distinguish how this case is different. In  
8 Florida NAACP 24 F 3rd 271 at page 274. The Court says,  
9 "The licensee did not stereotype minorities when it merely  
10 pointed that few people who are interested in work in radio  
11 stations, minority or white, would be willing to put up with  
12 inconvenient commute from the Tampa area for relatively low  
13 pay at the company."

14 The licensee was not speculating about its pay.  
15 The licensee was not speculating about the distance to  
16 Tampa. The licensee was not speculating about where  
17 minorities resided. It knew that.

18 This licensee was speculating based on nothing but  
19 an impermissible racial stereotype on whether minorities had  
20 classical expertise sufficient to work there.

21 MS. GREENE: Well, didn't the Administrative Law  
22 Judge find that they considered the composition of the  
23 specific audience of the station as part of -- in coming up  
24 with this rationale?

25 MR. HONIG: That's right.

1                   TIMEKEEPER: Mr. Honig, I just want to remind you  
2 again of your rebuttal time --

3                   MR. HONIG: To an extent, to the extent that Mr.  
4 Cleary perhaps conceived of this idea that classical  
5 expertise would be helpful. That's non-discriminatory and  
6 that's permissible. It was in the application of that and  
7 the inference that minorities, we think, don't have this  
8 expertise.

9                   MS. GREENE: Well, is there anything in the record  
10 that --

11                  MR. HONIG: They didn't look for them.

12                  MS. GREENE: Does the record show that the  
13 application of the argument of counsel -- that there was an  
14 application of that argument before that argument was made,  
15 or that it just came up at the time they were writing  
16 pleadings? Is there anything that indicates that they acted  
17 on that argument in advance of that argument first appearing  
18 in the pleading?

19                  MR. HONIG: It was a perfect crime in this sense.

20                  MS. GREENE: But you --

21                  MR. HONIG: They never recruited minorities, so  
22 unsurprisingly they never had the opportunity or the fortune  
23 or misfortune to have a minority come before them and have  
24 indulge their stereotype.

25                  Let me add that they did hire a minority, not

1 black, who had applied. A preference need not be absolute  
2 to be invidious. None of the school cases since Cooper v.  
3 Aaron involved a school district that said, "Blacks can't  
4 attend, and there must be zero black attendance at a white  
5 school." But it's just as invidious when it's a preference  
6 as when it is an absolute preference.

7 MS. GREENE: No, I very much appreciate the  
8 argument that you're presenting, which is that you can use  
9 such criteria in order to implement and an intent to  
10 discriminate, whether it's a conscious one or a subconscious  
11 one.

12 But in this case we're dealing with the record  
13 which shows that the idea for a classical music requirement  
14 came from Mr. Cleary, who had been hired as a consultant to  
15 help them become a financially viable commercial station.

16 MR. HONIG: That's right. Mr. Cleary never said  
17 that he assumed or that he planted in their mind the idea  
18 that one race was more likely to have these skills and  
19 abilities.

20 MS. GREENE: But my question back to you, is there  
21 anything in the record that suggests that that idea was  
22 planted at any point, or acted on at any point before it  
23 appeared in the pleading.

24 MR. HONIG: It didn't come from aliens from the  
25 planet Zoron. It found its way into a pleading which was

1 carefully written in a context where the station had to be  
2 completely focused on the subject of the challenge which was  
3 the entire record. It was a statement that was trying to  
4 explain why license renewal should be granted based on seven  
5 years. They were looking backward as well as forward, and  
6 it was repeated again and again.

7 If I may, I'd like to conclude with just one quick  
8 point, going to some undercurrents that I have heard today  
9 relating to the question of general deterrence and the  
10 question of equity.

11 We don't take a strong position on the question of  
12 what the forfeiture should be. Presumably this is a church,  
13 so perhaps, I don't know if the parishioners or the prophets  
14 will pay it. It doesn't matter that much.

15 But we do have only one significant substantive  
16 rule yet after yesterday and that's this rule. And this is  
17 not a case where we're urging that this licensee be purged  
18 from broadcasting forever as punishment. We do think that  
19 general deterrence is a factor that has to be taken into  
20 account and that general deterrence is only meaningful when  
21 the industry realizes that when you actually put it in  
22 writing, and this is an industry where it's usually not  
23 written down. Sophisticated people don't write these things  
24 down.

25 Then you will be given a little less process in

1 retaining your valuable privilege than others. That is, it  
2 will be denied. You can then show, as the applicant in the  
3 Richard Richards case did, and show that even in the worst  
4 cases of misconduct is not impossible. That there has been  
5 some rehabilitation. But we don't have rehabilitation here.  
6 We have not repentance.

7 CHAIRMAN MARINO: But Mr. Honig --

8 MS. GREENE: I have a question.

9 CHAIRMAN MARINO: I'm sorry. Go ahead.

10 MS. GREENE: I'd like to just pursue this  
11 rehabilitation question because I'm not sure what you're  
12 referring to, whether it is an inadequate recruitment  
13 program or an inadequate effort to comply with the EEO  
14 program that --

15 MR. HONIG: It is both. And if in a subsequent  
16 hearing where they reapply and there are presumably other  
17 applicants, and the question comes up, as it undoubtedly  
18 will, should this disqualifying behavior be held against  
19 them here or are they rehabilitated. Then they could show  
20 that between 1990 and 1999, or whenever this happens,  
21 there's been a profound sea change.

22 MS. GREENE: Well, I didn't quite finish the  
23 second part of my question.

24 Whether the rehabilitation goes to recruitment  
25 efforts or whether they also need to be rehabilitated in the

1 broader discrimination --

2 MR. HONIG: It goes to both. And the best  
3 evidence that there's been no rehabilitation is that the  
4 person who supervised them was the continuing link for the  
5 misconduct got a promotion and is still the general manager.

6 CHAIRMAN MARINO: Mr. Honig, non-renewal has been  
7 analogized to capital punishment. That throughout the  
8 history of the FCC, and Congress in the '60s gave the  
9 Commission an option of putting a licensee on probation.  
10 That's a short-term renewal.

11 Would that send enough of a signal, we're going to  
12 look at your record in a year and the Judge has already  
13 imposed a hefty fine? Is that enough?

14 MR. HONIG: Absolutely not.

15 CHAIRMAN MARINO: Not enough sanctions.

16 MR. HONIG: It would be viewed by all of the  
17 secret and silent discriminators in the business as evidence  
18 that they basically got licenses in perpetuity as long as  
19 they are careful not to put it in writing the next time.

20 CHAIRMAN MARINO: But, Mr. Honig, in fairness,  
21 even you in your brief are troubled by this case, aren't  
22 you?

23 MR. HONIG: No. I am not one bit troubled.

24 CHAIRMAN MARINO: You're troubled --

25 MR. HONIG: No, no.

1           CHAIRMAN MARINO: Let me explain why. Because you  
2       tried to carve out the Church and send the Church off and  
3       focus on, I guess, the licensee. Don't you? I mean you --

4           MR. HONIG: No, let me explain the nature of what  
5       you perceive is my trouble.

6           The Church is the legal entity ultimately  
7       responsible under the Commission's policies and law of  
8       agency. But the Board for Communications Services, an  
9       internal nonecclesiastical entity was delegated by the  
10      Church the authority to exercise its functions. The  
11      subject, as Rev. Bohlmann testified, to his very general and  
12      non-specific oversight.

13           It is much like the case involving the trustees of  
14      the University of Pennsylvania, where the student general  
15      manager and the broadcasting department had exercised a  
16      lack-of-control loss over that station, WXPB. The trustees  
17      of the University of Pennsylvania were not personally  
18      culpable in the sense of them being the direct actors. They  
19      were simply the people who had the ultimate responsibility  
20      and thus had to suffer the consequences.

21           CHAIRMAN MARINO: Thank you.

22           MR. HONIG: Thank you.

23           MS. GREENE: Thank you.

24           MS. SCHMELTZER: May it please the Board, I would  
25      like to respond to some of the arguments that have been made



1 by the Mass Media Bureau and the NAACP. And I'd also like  
2 to first address a concern that Board Member Greene had.  
3 And that is concerning what the record shows about the  
4 classical music knowledge, and I would refer you to  
5 paragraph 149 of the Initial Decision, which says -- where  
6 the Judge found -- "According to Mr. Stortz, the need for  
7 classical music knowledge for various positions including  
8 salespersons did not in any way affect the station's  
9 willingness to recruit individuals of any race. The  
10 stations had no sense that the requirement for familiarity  
11 with classical music would single out minorities for  
12 negative effect or would disqualify members of any race.  
13 And, moreover, to the best of Mr. Stortz' knowledge, no  
14 minority applicant was ever rejected for any position at  
15 KFUE-FM because he or she lacked knowledge of classical  
16 music."

17 This was a finding of fact in the Initial  
18 Decision. Mr. Stortz was found to be a credible witness and  
19 neither the NAACP nor the Mass Media Bureau has challenged  
20 that finding by the Judge. And Rev. Devantier, who also  
21 testified at the hearing, was found to be a credible  
22 witness.

23 All of the Church's witnesses were credible.  
24 Their testimony has not been challenged.

25 MS. GREENE: I have a question and I apologize

1 because I can't put my finger on the specific paragraph of  
2 the Initial Decision this comes from, but it's my  
3 understanding that in 1987 the various job application forms  
4 for both stations for salespeople did not provide for any  
5 special qualifications. And in 1989, they reflected the  
6 need -- the FM applications at least reflected the need for  
7 FM experience, as did for sales-related jobs, as did the  
8 applications for engineers in 1989.

9 And in responding to the Commission's questions,  
10 when the licensee said that classical music experience was a  
11 requirement, that was specifically for sales and it  
12 distinguished that from the engineering jobs.

13 MS. SCHMELTZER: Are you talking about the  
14 position descriptions or the application forms?

15 MS. GREENE: I thought I was talking about the  
16 application forms. I may be talking about --

17 MS. SCHMELTZER: I think you're talking about the  
18 position descriptions.

19 MS. GREENE: Well, what I'm getting to is why the  
20 response to the Commission would reflect for the sales  
21 positions a requirement for classical music and distinguish  
22 for the engineering positions when the same information was  
23 in the job description that it was not a requirement.

24 Doesn't that suggest that the licensee, in  
25 answering that question, understood the difference between a

1 requirement and a preference?

2 MS. SCHMELTZER: Well, I think you may be  
3 referring to the position descriptions, and those  
4 descriptions were -- I don't think there's any record in the  
5 evidence that they were ever used. There were a lot of  
6 different descriptions that we don't even know exactly where  
7 they came from or whether the station developed them or the  
8 International Center developed them, but there's no  
9 indication that they were used in any way to discriminate.

10 And, in fact, I think the licensee has actually  
11 used the words "preference" and "requirement" somewhat  
12 interchangeably, obviously to the licensee's regret at this  
13 point in time. But I mean sometimes people take words for  
14 more than they are intended. And I think in the case of the  
15 classical music argument, too.

16 Unfortunately Mr. Honig is seriously misconstruing  
17 anything that was ever intended by that argument. It was a  
18 defense by counsel. It was used to point out facts about  
19 the labor pool. Counsel had made a similar argument  
20 previously before the Commission and it had been accepted.  
21 And there's no reason to hold this against the Church in the  
22 fashion that Mr. Honig is suggesting.

23 I think that the earnestness with which the Church  
24 has approached FCC requirements can be considered by a  
25 number of factors. That the Church had an EEO policy. The

1 Church had FCC counsel, which a lot of stations don't have.  
2 They contacted at least some recruitment sources throughout  
3 the license period.

4 The general manager was sent to attend the State  
5 Broadcasters Association seminar, which covered renewal and  
6 EEO. They obtained the NAB Legal Guide and used forms from  
7 that guide. That's where the blanket form that was sent out  
8 in July came from.

9 The general manager analyzed the station's  
10 compliance from the fall of '88 through April '89. He wrote  
11 two memos on it. He spoke with Rev. Devantier about. Rev.  
12 Devantier spoke to the Board for Communications Services  
13 about it. These do not suggest a licensee that does not  
14 want to comply, or that is in any way trying to flagrantly  
15 violate FCC rules. They suggest a licensee that is doing  
16 its best to comply.

17 The Church has candidly admitted maybe it could  
18 have done more. It admitted that on the hearing record in  
19 their testimony and during the cross-examination. But that  
20 does not suggest either that the supervision was inadequate  
21 or that they failed, or that they lacked candor before the  
22 Commission.

23 The statement that they actively recruit. If you  
24 look at the Form 396, there's a statement, a blanket  
25 statement, that says, "We encourage minority and female

1 applicants to apply." And every licensee signs that form.

2 Does that mean that a licensee that has no  
3 minority or female applicants has lied to the Commission or  
4 lacked candor? We think not. And I've researched every EEO  
5 case that's been before this Commission that's in Pike &  
6 Fischer. I can't find any situation where someone was  
7 denied a license or fined \$50,000 for the kind of activity  
8 that we have here.

9 TIMEKEEPER: Your rebuttal time is up.

10 MS. SCHMELTZER: I would just like to make --

11 CHAIRMAN MARINO: Take another minute to sum up.

12 MS. SCHMELTZER: Thank you very much.

13 CHAIRMAN MARINO: Or two.

14 MS. SCHMELTZER: Mr. Zauner has suggested that the  
15 HDO set a \$250,000 forfeiture, and so it's okay to fine us  
16 for 20 percent of that. Again, I say that's a subjective --  
17 I think he admitted that it was a subjective judgment. We  
18 think it's arbitrary.

19 With regard to the Amos case and the reference to  
20 non-profit organizations. The Church is a non-profit  
21 organization. The AM station is non-profit. Many of the  
22 positions at the AM and the FM are combined positions.

23 While the FM is presently operated commercially  
24 during the history of this proceeding, it was really not  
25 making a profit. It was only making a paper profit because

1 of bequests and gifts. But in any event, I refer you to  
2 Footnote 7 of our limited exceptions, which indicate that  
3 Amos should be construed to apply to the religious mission  
4 of organizations such as the Church.

5 And I would also say in answer to the question I  
6 had before about the constitutional argument, that it's my  
7 understanding you can't waive a constitutional argument.  
8 We'd be happy to brief the Review Board on that if you need  
9 briefs.

10 MS. GREENE: Thank you very much.

11 MS. SCHMELTZER: Thank you.

12 And on behalf of myself and I know everyone here  
13 in the room, I would also like to thank the Board Members  
14 for their long service to the Commission.

15 CHAIRMAN MARINO: Well, I want to thank both of  
16 you for recognizing the elimination of the Review Board of  
17 circumstances really compelled them and there is no way of  
18 continuing it, but I'm going to continue a tradition that we  
19 established in 1981, when both Board Member Blumenthal and I  
20 joined the Board, Mr. Honig, and I'm looking at you, because  
21 I want you to do this for us, and I don't know if Board  
22 Member Greene is going to support what I'm going to ask you  
23 to do. But she's perfectly capable of speaking for herself.

24 Both Board Member Blumenthal and I, because we  
25 spent a lot of time in litigation, also had come to learn

1 the value of settlement. And encouraging parties,  
2 especially when we've got someone as eminent as the NAACP.  
3 And the licensee, or at least the ultimate power and charge  
4 of this licensee, to get together and see if they can settle  
5 this case.

6 So we give you that opportunity. It's going to  
7 take some time to write this decision. So if you could get  
8 someone high in authority of the NAACP to meet with the  
9 Church to see if some settlement could be worked out. I  
10 would appreciate it. I don't know if Board Member Greene  
11 supports that or not. But --

12 MS. GREENE: I would just like to go off the  
13 record at this point.

14 (Whereupon, at 11:25 a.m., the hearing was  
15 concluded.)

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**REPORTER'S CERTIFICATE**

**FCC DOCKET NO.:** MM-9410

**CASE TITLE:** Applications of Lutheran Church/Missouri Synod for Renewal of  
Licenses of Stations KFUO and KFUO-FM

**HEARING DATE:** February 9, 1996

**LOCATION:** Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date: 2/9/96

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